Supreme Court, U.S.
FILED
JUL 2 2003

No. 03-38

IN THE

Supreme Court of the United States

MICHAEL DEVEGTER and
RICHARD POIRIER, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID G. RUSSELL
Counsel of Record
PARKER, HUDSON, RAINER
& DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Ave., N.E.
Atlanta, Georgia 30303
(404) 523-5300

BRUCE MALOY
MALOY & JENKINS
75 Fourteenth Street, NW
25th Floor
Atlanta, Georgia 30309

Attorneys for Petitioner
Michael deVegter

CRAIG A. GILLEN
GILLEN, PARKER & WITHERS LLC
One Securities Centre
Suite 1050
3490 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 842-9456

Attorneys for Petitioner
Richard Poirier, Jr.

181587

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

61PP

QUESTIONS PRESENTED

Petitioners were convicted of wire fraud in violation of 18 U.S.C. § 1343 for alleged deprivation of property of a Georgia county in the form of information. Under uncontested and traditional Georgia law, confidential business information does not constitute property in the absence (as here) of an enforceable agreement or statutory trade secret status. Given this relevant state law, the government's failure to prove that the information was property in the hands of the County, and the district court's failure to instruct the jury on when information can constitute property, and wholly ignoring *Cleveland v. United States*, 531 U.S. 12 (2000), the Eleventh Circuit affirmed the conviction. It also affirmed a pattern jury charge that allowed "financial gain to one's self" to constitute intent to defraud, without the jury having to find intent to harm the victim. Despite Petitioners' being charged with but not convicted of honest services fraud under 18 U.S.C. § 1346, such that § 1346 was not the count of conviction, the Eleventh Circuit reversed the sentencing court's use of Guideline § 2F1.1 (2000), which is specified for fraud, and remanded for use of the harsher § 2B4.1, which is specified for commercial bribery.

The three questions presented are:

1. Does the wire fraud statute's prohibition of property deprivation exclude information not within the relevant state's definition of property, and should the court or the jury decide when information constitutes property.

2. Must a jury charge on intent to defraud clearly require the jury to find the defendant's intent to harm the victim, not just intent to benefit the defendant, before convicting under 18 U.S.C. § 1343.

3. Should the Sentencing Guidelines specification of § 2F1.1 for fraud govern sentencing when the count of conviction is solely property wire fraud under 18 U.S.C. § 1343, which was not used as a vehicle to prosecute another offense.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	x
Opinions Below	1
Statement of Basis for Jurisdiction in the United States Supreme Court	1
Constitutional Provisions, Statute, and Sentencing Guidelines Involved in Case	1
Statement of the Case	3
A. Factual Statement	3
B. Proceedings Below	6
Reasons for Granting the Petition	8
A. This Court Should Settle the Important and Recurring Federal Questions of Whether the Wire Fraud Statute's Prohibition of Property Deprivation Excludes Information Not Within the Relevant State Law's Definition of Property, and Whether a Judge or a Jury Should Decide When Information Constitutes Property Under 18 U.S.C. § 1343.	8

Contents

Page

B. In Conflict with Five Other Circuits, the Eleventh Circuit Approved a Pattern Jury Charge Allowing a Conviction Under 18 U.S.C. § 1343 With Intent to Defraud Being Shown Merely by the Defendant's Desire to Benefit Financially, Even in the Absence of Intent to Harm the Victim. 13

C. In Conflict With the Decisions of this Court and Other Circuits, the Eleventh Circuit Selected a Sentencing Guideline For a Crime that Was Not the Count of Conviction. 16

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases

Allen v. Hub Cap Heaven, Inc., 225 Ga. App. 533, 484 S.E.2d 259 (1997) 10

Belt v. United States, 868 F.2d 1208 (11th Cir. 1989) 11

Braxton v. United States, 500 U.S. 344 (1991) .. 16, 18, 20

Buford v. United States, 532 U.S. 59 (2001) 17

Carpenter v. United States, 484 U.S. 19 (1987) .. *passim*

Cleveland v. United States, 531 U.S. 12 (2000) ...i, 8, 9, 12

Diamond v. Oreamuno, 24 N.Y. 2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969) 10

Dirks v. SEC, 463 U.S. 646 (1983) 10

Drye v. United States, 528 U.S. 49 (1999) 9

Durham v. Stand-By Labor of Ga., Inc., 230 Ga. 558, 198 S.E.2d 145 (1973) 10, 11

Hardaway Co. v. Rives, 262 Ga. 631, 422 S.E.2d 854 (1992) 11

McNally v. United States, 483 U.S. 350 (1987) .. 8, 9, 11

Cited Authorities

	Page
Neder v. United States, 527 U.S. 1 (1999)	12
Prudential Ins. Co. v. Baum, 629 F. Supp. 466 (N.D. Ga. 1986)	10
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	10
United States v. Brown, 79 F.3d 1550 (11th Cir. 1996)	9
United States v. Cohen, 171 F.3d 796 (3d Cir. 1999)	19
United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997)	11
United States v. D'Amato, 39 F.3d 1249 (2d Cir. 1994)	14
United States v. Day, 943 F.2d 1306 (11th Cir. 1991)	18
United States v. Dinome, 86 F.3d 277 (2d Cir. 1996)	14
United States v. Frank, 156 F.3d 332 (2d Cir. 1998)	14
United States v. Gabriel, 125 F.3d 89 (2d Cir. 1997)	15

Cited Authorities

	Page
United States v. Gaudin, 515 U.S. 506 (1995)	12
United States v. Goodrich, 871 F.2d 1011 (11th Cir. 1989)	9
United States v. Hauptman, 111 F.3d 48 (7th Cir. 1997)	19, 20
United States v. Jain, 93 F.3d 436 (8th Cir. 1996) ...	14
United States v. Josleyn, 99 F.3d 1182 (1st Cir. 1996), *cert. denied sub nom. Billmyer v. United States*, 519 U.S. 1116 (1997)	19-20
United States v. Kurtz, 237 F.3d 154 (2d Cir. 2001)	19
United States v. Leonard, 61 F.3d 1181 (5th Cir. 1995)	14
United States v. Lew, 875 F.2d 219 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990)	14
United States v. Montani, 204 F.3d 761 (7th Cir. 2000)	19
United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998)	11
United Sates v. Poirier, 321 F.3d 1024 (11th Cir. 2003)	14, 17, 20

Cited Authorities

Page

United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998) 16, 18, 19

United States v. Shotts, 145 F.3d 1289 (11th Cir. 1998) 9

United States v. Starr, 816 F.2d 94 (2d Cir. 1987) ... 14, 15

United States v. Stockheimer, 157 F.3d 1082 (7th Cir. 1998), *cert. denied*, 525 U.S. 1184 (1999) 14

United States v. Stouffer, 986 F.2d 916 (5th Cir.), *cert. denied*, 510 U.S. 837 (1993) 14

United States v. Utz, 886 F.2d 1148 (9th Cir. 1989) 14

United States v. Walker, 191 F.3d 326 (2d Cir. 1999) 14

Statutes

18 U.S.C. § 1341 ..... 8, 9

18 U.S.C. § 1343 ..... *passim*

18 U.S.C. § 1346 ..... i, 6, 16, 18

18 U.S.C. § 1001 2

28 U.S.C. § 1254(1) 1

Cited Authorities

Page

Georgia Open Records Act, O.C.G.A. §§ 50-18-70 through 50-18-77 11

Georgia Trade Secrets Act, O.C.G.A. § 10-11-761(4) 11

Other Authorities

U.S.S.G. § 1B1.2(a) (2000) 2, 16, 17

U.S.S.G. § 2B4.1 (2000) ..... i, 7, 17

U.S.S.G. § 2F1.1 (2000) ..... *passim*

Ga. Op. Atty. Gen. 91-11 (April 22, 1991) 11

Ga. Op. Atty. Gen. 94-15 (March 31, 1994) 11

Ga. Op. Atty. Gen. 95-31 (June 21, 1995) 11

Constitutional Provisions

U.S. Const. amend. V 1, 12, 17

U.S. Const. amend. VI 2, 12, 17

U.S. Const. art. III, § 2 ..... 1, 17

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed February 13, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The Northern District Of Georgia, Atlanta Division Dated And Filed March 24, 2003 ..... 21a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing En Banc Filed April 15, 2003 ..... 27a

Petitioners Michael deVegter and Richard Poirier, Jr. respectfully request the issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit regarding the application of and sentencing under 18 U.S.C. § 1343.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 321 F.3d 1024 and is copied at Appendix A. A copy of an opinion entered by the sentencing judge is at Appendix B.

STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

The Eleventh Circuit entered its judgment on February 13, 2003 (Appendix A), and it denied the petition for rehearing and petition for rehearing en banc on April 15, 2003 (Appendix C). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND SENTENCING GUIDELINES INVOLVED IN CASE

Article III, § 2 of the United States Constitution provides in part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury.

18 U.S.C. § 1343 provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . shall be fined under this title or imprisoned not more than five years, or both.

U.S.S.G. § 1B1.2(a) (2000) provides in part:

> Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). * * * Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction.

U.S.S.G. § 2F1.1, Application Note 14 (2000), provides in part:

> Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. * * * In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as

jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than § 2F1.1. Otherwise, in such cases, § 2F1.1 is to be applied, but a departure from the guidelines may be considered.

STATEMENT OF THE CASE

A. Factual Statement

In 1992 Fulton County, Georgia, retained as co-financial advisors Stephens Inc. and Carmona Motley, Inc. (R-163-1428; Gov't Ex. 6.) As a part of their services, the financial advisors were to assist in the selection of underwriters for bond issues. The Fulton County Commission possessed the ultimate authority to select underwriters, and it acted on the advice of the County Finance Director, Peter Cunningham. (R-163-1460.) The financial advisors, who reported to Cunningham, had no control over the process and had no diseretion or authority to bind Fulton County. (R-164-1542.)

Fulton County had selected the financial advisors after a request for proposals, or RFP, for their services. That RFP contained a broad, vague, and perpetual provision that no information "given to or prepared by the firm under the contract shall be made available to any individual or organization by the firm without the prior written approval of the County." (Gov't Ex. 2 at p. 15.) Otherwise, Fulton County did not provide

the financial advisors with any rules or instructions on confidentiality. (R-163-1442; R-158-564; R-163-1443.) There was no evidence that the documents at issue in this case were maintained with any degree of secrecy, or that the documents were segregated or designated as confidential.

The financial advisors drafted a preliminary RFP for underwriters. It was cobbled together from publicly available information, like that used by other bond issuers. (R-158-547-48, 551, 553-54; R-167-2025.) It did not contain any confidential or proprietary information of Fulton County. As Cunningham stated: "Nothing confidential or proprietary. It's all public record and just boilerplate information that you could find on any number of RFP's in any number of other counties or cities or whatever." (R-163-1442.) The draft RFP merely contained general questions concerning affirmative action programs, experience in refundings, and regulatory problems. (R-163-1442; *see* Gov't Ex. 9.)

There was some evidence that Petitioner deVegter, who took the lead for Stephens, assisted underwriter Lazard Freres in obtaining a position on a bond refunding issue. One witness said deVegter faxed the incomplete, draft RFP (Gov't Ex. 9) to Lazard a week before the final RFP was issued. (R-158-587.)[1] Not one witness testified that the draft RFP was confidential. There was no evidence that the draft RFP was property in the hands of Fulton County. In closing arguments, the government did not contend that the draft RFP was confidential or the property of Fulton County.

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1. According to underwriter Goldman Sachs (a competitor of Lazard), it is not unusual for an underwriter to receive a draft of an RFP prior to its final issuance. (R-164-1646-47.) Cunningham did not see a material problem with disclosing the "boilerplate" draft RFP. (R-164-1590-92.)

Underwriters submitted their inalterable proposals to Fulton County, Stephens, and Carmona Motley. (R-163-1459.) Petitioner deVegter allowed Goldman Sachs to review all of the proposals. (R-164-1644-46.) There was some evidence that deVegter faxed to Lazard the proposal submitted to Stephens by another underwriter, Bear Stearns. (R-158-587; Gov't Ex. 16d.) There was no claim, no evidence, and no argument by the Government in closing that Fulton County owned the Bear Stearns proposal or considered that proposal to be County property.

After his independent evaluation, Cunningham believed that Lazard's proposal was the best: it was unique and offered to Fulton County benefits not offered by others. (R-163-1445-46, 1448, 1454; R-164-1579, 1622-23.) Following two weeks of political jockeying, the Commissioners ultimately chose Lazard as the lead underwriter.[2]

Approximately three months after Lazard was selected and after the bond closing, Lazard sent a finder's fee check to a consultant it employed, Nat Cole. (Gov't Ex. 32, 33, 34, 38.) Lazard customarily paid such fees to Cole and others, and there was some evidence that Petitioner Poirier approved the payment on behalf of Lazard. (R-161-1113; R-160-993.) Cole took credit for first alerting Lazard to the Fulton County deal and claimed to be "the finder." (R-156-288.) Cunningham saw nothing wrong in an underwriter paying a finder's fee. (R-163-1435-36.) Cole thereafter sent a check to deVegter for over $40,000. (Gov't Ex. 38, 41.)

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2. According to Cunningham, Lazard performed its services as lead underwriter in an "excellent" fashion. (R-164-1544.) Fulton County realized debt savings of $8.6 million and benefited by modernizing its bond covenants and by increasing its rating. (R-164-1550; MD Ex. 90.) Lazard's strategy allowed Fulton County "to sell those bonds at the most attractive rates and prices." (*Id.*) The bonds were priced fairly, and the deal was "a very good transaction for Fulton County." (R-164-1543.)

B. Proceedings Below

The federal indictment returned in the Northern District of Georgia in December 1997 charged Petitioners with "money or property" and "honest services" wire fraud in violation of 18 U.S.C. §§ 1343 and 1346, respectively. (R-1.) The jury convicted on the § 1343 charge and related conspiracy, but *not* on the § 1346 honest services charge. (R-145.)

At trial, after the government rested, Petitioners moved for judgment of acquittal, based in part on insufficient evidence of "property" for purposes of 18 U.S.C. § 1343. After that motion's denial and with the evidence concluded, the district court did not instruct the jury on when information could constitute property. The jury received absolutely no legal guidance on this issue.

As a part of its charge, the district court instructed that an element of § 1343 wire fraud was intent to defraud, explaining:

> To act with intent to defraud means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another *or bringing about some financial gain to one's self.*

(R-167-2148-49 (emphasis added).) The court repeated this disjunctive standard for intent to defraud under § 1343, and then, in its charges on § 1346 honest services fraud, stated:

> *Unlike the charge of wire fraud for obtaining money or property*, the charge of wire fraud to deprive another of honest services must include some detriment to the employer. That is, *proof that the purpose of the scheme was only for gain to the*

> *employee or fiduciary and not to deprive the victim/employer of money or property would not suffice to convict under Section 1346.*

(R-167-2151 (emphasis added).) Petitioners timely objected to the charge because it allowed the jury to find intent to defraud merely by finding that deVegter intended to bring about some gain to himself. (R-166-1972.) As given, the charge allowed the government to argue in closing that the jury should convict if it simply found gain to the defendants:

> But listen carefully to the judge's instruction. The money and property count can be proven by proof that the defendants sought to gain for themselves money or property by means of false pretenses, representations or promises. And you know that it was.

(R-167-2131.)

On a Rule 29 motion, the district court sustained the verdict solely on the theory that Fulton County had been deprived of property in the form of information. (R-171.) At sentencing, the court applied sentencing guideline § 2F1.1, which governs fraud and deceit. Petitioners were sentenced to one year of probation, six months of community service, and a fine of $5,000. (R-181.) Petitioner deVegter has now satisfied that sentence in full. On appeal, the Eleventh Circuit affirmed the conviction but remanded the case for resentencing under the guideline for commercial bribery, § 2B4.1. The government has argued that § 2B4.1 should lead to 51 months in prison.

REASONS FOR GRANTING THE PETITION

A. This Court Should Settle the Important and Recurring Federal Questions of Whether the Wire Fraud Statute's Prohibition of Property Deprivation Excludes Information Not Within the Relevant State Law's Definition of Property, and Whether a Judge or a Jury Should Decide When Information Constitutes Property Under 18 U.S.C. § 1343.

In this Information Age, the Court should set a clear standard for who determines and how to determine what information constitutes "property," the fraudulent deprivation of which is a federal crime under 18 U.S.C. § 1343. In the instant case, the information in the hands of the alleged victim, a Georgia county, was not legally cognizable as property under relevant Georgia state law. The government made no effort to prove the information constituted property of Fulton County, focusing instead on its unsuccessful honest services theory under § 1346. Similarly, the district court failed to instruct the jury on when information may constitute legally cognizable property. Wholly ignoring *Cleveland v. United States*, 531 U.S. 12 (2000), the Eleventh Circuit affirmed a property-based wire fraud conviction by its unanalytical reliance on snippets from *Carpenter v. United States*, 484 U.S. 19 (1987). Other courts have done likewise, short-changing a defendant's right to rely on the "traditional concept[] of property" as set forth under state law. *See Cleveland*, 531 U.S. at 24. Defendants, like Petitioners, have been convicted by juries that received no legal guidance on when confidential information can constitute property.

Like the mail fraud statute, 18 U.S.C. § 1341, the wire fraud statute is "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987).

Cf. Carpenter, 484 at 25 n.6 (applying the same analysis to the mail and wire fraud statutes). "It does not suffice," this Court recently explained, "that the object of the fraud *may* become property in the recipient's hands; for purposes of the mail [or wire] fraud statute, the thing obtained *must be property in the hands of the victim*." *Cleveland*, 531 U.S. at 15 (emphasis added). *Cleveland* analyzed the "traditional concept[] of property" under Louisiana law to conclude that a video poker license was not property, and it set aside a mail fraud conviction. *Id.* at 22-24.[3]

The wire fraud statute does not define property, and therefore courts resolving this question of federal law should look first to state law. *See id.* at 21-25 (analyzing Louisiana law); *United States v. Shotts*, 145 F.3d 1289, 1293-94 (11th Cir. 1998) (applying Alabama property law after surveying cases from various federal circuits and observing: "state law appears to control the definition of property under Section 1341"). *See also, e.g., Drye v. United States*, 528 U.S. 49, 58 (1999) (courts should "look initially to state law"); *United States v. Goodrich*, 871 F.2d 1011, 1015 (11th Cir. 1989) (affirming dismissal of mail fraud charge where Florida property law did not recognize right at stake as a property interest).

In *Carpenter*, for example, while this Court observed that "[c]onfidential business information has long been recognized as

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3. Moreover, *Cleveland* acknowledged that to the extent "property" is ambiguous as placed in § 1341, ambiguity concerning the ambit of the criminal statues must be resolved in favor of lenity. *Id.* at 25. *See McNally*, 483 U.S. at 358-60; *United States v. Brown*, 79 F.3d 1550, 1556 (11th Cir. 1996) ("the Rule of Lenity commands that where there are alternative readings of a criminal statute we are to choose the harsher only when Congress has spoken in clear and definite language").

property," it reached this conclusion based on prior opinions construing state law. *See Carpenter*, 484 U.S. at 26 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984) (dealing with trade secrets under Missouri law); *Dirks v. SEC*, 463 U.S. 646, 653 n.10 (1983); *Diamond v. Oreamuno*, 24 N.Y.2d 494, 497, 301 N.Y.S.2d 78, 80, 248 N.E.2d 910, 912 (1969) (applying New York law)).

In the instant case, there was no evidence that the information at issue (contained in the draft RFP and the Bear Stearns proposal) was confidential or property owned by Fulton County. On this basis alone the property fraud conviction should not stand.

Even assuming *arguendo* that the information was confidential, in Georgia confidential business information does not fall "within the purview of traditional Georgia law as to property." *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 563, 198 S.E.2d 145, 149 (1973). *See also Prudential Ins. Co. v. Baum*, 629 F. Supp. 466, 470 (N.D. Ga. 1986) (citing *Durham* and noting Georgia does not protect confidential information without a valid confidentiality agreement).[4] The government never contested this point of Georgia law.[5]

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4. The vagueness and perpetuity of the clause contained in Fulton County's RFP for financial advisors render it unenforceable on its face. *See Allen v. Hub Cap Heaven, Inc.*, 225 Ga. App. 533, 538-39, 484 S.E.2d 259, 265 (1997).

5. The indictment failed to allege, the Government failed to offer evidence or argument concerning, and the district court did not charge a theory suggesting Fulton County's possession of trade secrets. Georgia does not treat the information at issue as a trade secret. For information to acquire Georgia trade secret protection, the information must not be commonly known or available to the

(Cont'd)

Under Georgia's treatment of when confidential information can constitute property, the information at issue here cannot support a wire fraud conviction. Many courts applying *Carpenter*, including the Eleventh Circuit in the instant case, have disregarded this Court's reliance on state law and assumed incorrectly that the *Carpenter* Court set a fixed rule of federal law about the proprietary nature of confidential business information. *See, e.g., United States v. O'Hagan*, 139 F.3d 641, 651 (8th Cir. 1998); *United States v. Czubinski*, 106 F.3d 1069, 1074 (1st Cir. 1997); *Belt v. United States*, 868 F.2d 1208, 1213 (11th Cir. 1989). The result is the unacceptable conundrum created by the Eleventh Circuit in the instant case. Under it, the government potentially may secure a conviction and a five-year prison term based upon misappropriation of information — yet Fulton County, Georgia, cannot protect the same information as its purported "property" through even a civil injunction or damages. *See Durham*, 230 Ga. at 563, 198 S.E.2d at 149.

Because a conviction under these circumstances cannot protect or enforce property rights in any way, *see McNally*, 483 U.S. at 360, the approach of the Eleventh Circuit diverges wildly from the limited purpose this Court has articulated for the wire fraud statute. Without this Court's directing lower courts how to determine if information is "property" under § 1343, those courts

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public, must derive "economic value" from its secrecy, and must be subject to reasonable efforts to preserve its secrecy. *See* O.C.G.A. § 10-11-761(4). As a public entity subject to the Georgia Open Records Act, O.C.G.A. §§ 50-18-70 through 50-18-77, Fulton County cannot possess trade secrets. *See Hardaway Co. v. Rives*, 262 Ga. 631, 632-35, 422 S.E.2d 854, 856-58 (1992); Ga. Op. Atty. Gen. 95-31 (June 21, 1995); Ga. Op. Atty. Gen. 94-15 (March 31, 1994); Ga. Op. Atty. Gen. 91-11 (April 22, 1991).

will continue to over-extend *Carpenter* without regard to applicable state law, putting every person who forwards an e-mail at risk of a federal prosecution. With the mere incantation of "confidential," information is magically transformed into property.

Defendants such as Petitioners have a constitutional right to a jury determination of guilt or innocence as to each element of the criminal offense. *See* U.S. Const. amend. V, VI; *United States v. Gaudin*, 515 U.S. 506, 509-510 (1995). Indisputably, the existence of legally cognizable "property" in the hands of the victim is an essential element of property-based wire fraud under § 1343. *Cleveland*, 531 U.S. at 15. In the instant case, the district court failed to instruct the jury on when information could constitute property in the hands of Fulton County, Georgia. Thus, the jury convicted without ever being asked to determine if the essential element of property existed in the County's hands. The constitutional error here was hardly harmless given evidence that the information was not confidential, was not the County's property, was not subject to any enforceable agreement, and was not contended to be a trade secret. The jury was not asked to address *any* of these critical fact issues. *See Neder v. United States*, 527 U.S. 1, 18 (1999) ("Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?").

This Court should settle the important and recurring issue of federal law whether a jury should decide when certain information constitutes the essential element of property, or whether the court as a matter of law should decide if property exists. In its previous decisions, the Court apparently has decided this essential element as a matter of law and not remanded for a jury determination. *See Cleveland*, 531 U.S. at 26-27. ("We conclude that . . . a Louisiana video poker license in the State's hands is not 'property'

under § 1341."); *Carpenter*, 484 U.S. at 28. ("The Journal's business information that it intended to be kept confidential was its property.") Such categorical legal rulings allow district courts to conclude whether property exists without ever submitting this essential element to the jury. This is constitutionally improper especially in fact-intensive situations like the instant case.

B. In Conflict with Five Other Circuits, the Eleventh Circuit Approved a Pattern Jury Charge Allowing a Conviction Under 18 U.S.C. § 1343 With Intent to Defraud Being Shown Merely by the Defendant's Desire to Benefit Financially, Even in the Absence of Intent to Harm the Victim.

Beyond question, intent to defraud is an essential element of wire fraud under 18 U.S.C. § 1343. The Eleventh Circuit opinion below, however, impermissibly and systemically allows juries to find intent to defraud merely from a defendant's desire to benefit financially, even in the absence of any intent to harm the alleged victim. The pattern jury charge approved by the Eleventh Circuit is directly at odds with five other Circuits, which properly require a conviction to be based on intent to harm the victim. This patent conflict with other Circuits on an important and recurring question of federal law calls for this Court's review.

The district court allowed the jury to find intent to defraud for property wire fraud based on a defendant's intent to harm Fulton County *or* to obtain some personal gain. The district court underscored a lessened intent element of property fraud in its subsequent instruction on the honest services wire fraud. The government seized the day and argued to the jury that it could convict merely if "defendants sought to gain for themselves money or property." (R-167-2131.) Without any proof of intended or actual financial loss to Fulton County, the jury likely did just as the government urged.

Contrary to five Circuits, the Eleventh Circuit concluded these instructions adequately defined "intent to defraud." *See Poirier*, 321 F.3d at 1031-32. In the Second, Fifth, Seventh, Eighth, and Ninth Circuits, however, these instructions would be insufficient. *See, e.g., United States v. Walker*, 191 F.3d 326, 335 (2d Cir. 1999) ("the defendant must have contemplated some actual harm or injury to the victims") (citing *United States* v. *Dinome*, 86 F.3d 277, 283 (2d Cir. 1996); *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994)); *United States v. Stockheimer*, 157 F.3d 1082, 1087-88 (7th Cir. 1998) ("An intent to defraud does not turn on personal gain. . . . [A]ll that matters is that [the defendant] intended to inflict a loss"), *cert. denied*, 525 U.S. 1184 (1999); *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996) (" 'the government must show that some actual harm or injury was *contemplated* by the schemer' ") (emphasis in original) (quoting *D'Amato*, 39 F.3d at 1257); *United States v. Leonard*, 61 F.3d 1181, 1187 (5th Cir. 1995) (the Government "must prove that the defendant contemplated or intended some harm to the property rights of the victim") (citing *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir.), *cert. denied*, 510 U.S. 837 (1993)); *United States v. Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989) ("A scheme to defraud, whether successful or not, remains within the purview of Section 1341 as long as the jury was required to find an 'intent to obtain money or property from the victim of the deceit' ") (quoting *United States v. Lew*, 875 F.2d 219, 222 (9th Cir. 1989)), *cert. denied*, 497 U.S. 1005 (1990).

The Second Circuit has thrown out mail fraud convictions based on "intent to defraud" instructions identical to those approved by the Eleventh Circuit. *See United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987). *See also United States v. Frank*, 156 F.3d 332, 337 (2d Cir. 1998) (concluding, although harmless under the circumstances, "it was error for the district

court to instruct the jury that it could find an intent to defraud based solely on the appellants' desire to gain a benefit for themselves"); *United States v. Gabriel*, 125 F.3d 89, 96-97 (2d Cir. 1997) (concluding trial court erred by failing to articulate that mail and wire defendants must have intended to harm their victims, even though error did not prejudice defendants under the circumstances). In setting aside the convictions, the Second Circuit explained:

> While a finding that defendants garnered some benefit from their scheme may be helpful to the jury to establish motive, it cannot be probative of fraudulent intent unless it results, or is contemplated to result, from a corresponding loss or injury to the victim of the fraud. The district court's charge effectively permits the jury to disregard any evidence of contemplated harm. . . .

Starr, 816 F.2d at 101.

By itself, the district court's identical instruction in the instant case on "intent to defraud" fails the test. As a whole, the instructions are dramatically insufficient and misleading because the district court stated twice that the jury could find property-based intent to defraud solely based on a defendant's intent to obtain personal gain, while a higher standard applied to honest services fraud. The Eleventh Circuit's failure to remedy, let alone acknowledge, these basic deficiencies in a pattern charge has produced a patent split in the Circuits on the required elements of property mail and wire fraud, necessitating this Court's review.

C. In Conflict With the Decisions of this Court and Other Circuits, the Eleventh Circuit Selected a Sentencing Guideline For a Crime that Was Not the Count of Conviction.

This Court, in *Braxton v. United States*, 500 U.S. 344 (1991), emphasized the obligation of sentencing courts to apply the provision of the Sentencing Guidelines " 'most applicable to the offense of conviction.' " *Braxton*, 500 U.S. at 346 (quoting U.S.S.G. § 1B1.2(a) (1990)). The Sentencing Guidelines specifically instruct the sentencing court to select the guideline "applicable to the offense of conviction (*i.e.*, the offense conduct charged in the indictment or information *of which the defendant was convicted*)." U.S.S.G. § 1B1.2(a) (2000) (emphasis added). "Because it is the only link between the defendant's offense of conviction and his or her sentence, the offense guideline section is the foundation of the sentence." *United States v. Saavedra*, 148 F.3d 1311, 1314 (11th Cir. 1998). If a sentencing court imposes a sentence for an offense other than the count of conviction, the sentence is invalid. *See Braxton*, 500 U.S. at 350-51.

Here, after the jury did not convict for honest services fraud under 18 U.S.C. § 1346, and after the § 1343 conviction was sustained solely on the basis of property deprivation, the sentencing court properly selected guideline § 2F1.1, which the Statutory Index specifies for wire fraud under § 1343. Bolstering the jury's failure to convict under the honest services theory, the unrebutted evidence at sentencing was that Fulton County had "received the pure, unadulterated, honest opinion of" Petitioner deVegter. (App. B at 23a; Sentencing Tr. at 59-60.)

The Eleventh Circuit, however, brushed aside the district court's sentencing expertise and its proximity to witnesses and

evidence, as well as this Court's acknowledgement that "factual nuance may closely guide the legal [sentencing] decision, with legal results depending heavily upon an understanding of the significance of case-specific details." *Buford v. United States*, 532 U.S. 59, 65 (2001). *See also id.* at 66 (recognizing "the fact-bound nature of the legal decision, the comparatively greater expertise of the District Court, and the limited value of uniform court of appeals precedent" in the sentencing realm).

On its own, the Eleventh Circuit resurrected the failed honest services charge by this characterization of Petitioner deVegter's conduct: "Fulton County hired deVegter to provide fair and disinterested assistance in selecting an underwriter, and deVegter betrayed Fulton County." *Poirier*, 321 F.3d at 1034. Even though honest services fraud (and its lynchpins of betrayal and disloyalty) was not the count of conviction, the Eleventh Circuit ordered resentencing as if it were and imposed the harsher commercial bribery guideline, § 2B4.1. It did so by referencing three times Petitioner deVegter's relevant "conduct," instead of focusing on the count of conviction.

The offense of conviction, *not* relevant conduct, dictates the guideline. U.S.S.G. § 1B1.2. The Eleventh Circuit's focus on "whether defendants' conduct is 'more aptly' covered by a guideline other than § 2F1.1" is patently incorrect. It improperly opens the door to fundamentally unfair sentences based on a guideline for uncharged or acquitted conduct, in violation of constitutional protections of due process of law and trial by jury. *See* U.S. Const. art. III, § 2; amend. V, VI. The sentencing guideline for wire fraud should be applied unless the wire fraud statute is used as a broad jurisdictional vehicle to prosecute another criminal offense. U.S.S.G. § 2F1.1 application n.14 (2000). The example given in Application Note 14 shows why the Eleventh Circuit erred in ignoring the fraud guideline and in

applying the commercial bribery guideline. "For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud." *Id.* The example presupposes a state crime: arson. *See, e.g., United States v. Day*, 943 F.2d 1306, 1310-11 (11th Cir. 1991) (sentencing under arson guideline because "the facts . . . establish arson as defined by Florida law"). Here, the government never asserted commercial bribery as a federal or state offense, and, indeed, there is no such crime in Georgia. The instant indictment does not refer to bribery or kickback.

Application Note 14 goes on to say that the sentencing court may use another guideline if "the indictment . . . setting forth the count of conviction . . . establishes an offense more aptly covered by another guideline." *Id.* In this case, the "count of conviction" did not establish an offense more aptly covered by another guideline. Had the jury convicted under § 1346 honest services fraud, it might be a different story. It did not.

After the Eleventh Circuit's decision, the sentencing judge recused himself from further proceedings, explaining he could not "in good conscience impose the harsher sentence required by the panel's decision." (App. B at 22a.)[6] The sentencing judge's unusual action underscores the tremendous departure the Eleventh Circuit has taken from *Braxton*, other Circuits and even Eleventh Circuit precedent. Although *Braxton* specifically concerned an exception pertinent to guilty pleas, the decision also essentially forbids the federal courts from utilizing the myriad guidelines provisions to circumvent the indictment, arraignment, and trial process. *See Braxton*, 500 U.S. at 346, 350-51. Prior Eleventh Circuit case law, particularly *Saavedra*, remains faithful to this principle by instructing courts to sentence according to

6. The Eleventh Circuit allowed the record to be supplemented with the sentencing judge's order.

the Statutory Index, except in atypical cases in which a different guideline more aptly fits the count of conviction. *Saavedra*, 148 F.3d at 1315.

The instant decision of the Eleventh Circuit is directly at odds with the Seventh Circuit's decision in *United States v. Hauptman*, 111 F.3d 48, 50 (7th Cir. 1997). There the court emphasized that if "the bribing of [a person], rather than being the essence of the offense, was merely the means for defrauding [the person's] employer," then "fraud describes [the] offense better than bribery." *Id.* In other words, commercial bribery is the core offense only if a payment "deprives the bribed employee's employer of the employee's undivided loyalty," but the nature of the offense is fraud (thus § 2F1.1) where "bribery is the means used to defraud that employer of a substantial amount of money [or property]." *Id.* at 51. *Cf. United States v. Kurtz*, 237 F.3d 154, 156 (2d Cir. 2001) (concluding obstruction of justice, rather than fraud, guideline covered false statements conviction where offender "deprived defendants in criminal cases of their constitutional rights to be represented by bona fide attorneys").

Instead of supporting the Eleventh Circuit's deviation from the fraud guideline for the ordinary property fraud of which Petitioners were convicted, the cases on which the Eleventh Circuit relies either involve exceptional situations or are void of analysis. In *United States v. Montani*, 204 F.3d 761, 769 (7th Cir. 2000), the exceptional situation was the stipulation among the government, the defendant, the probation office, and the district court that the mail fraud offense was essentially bribery. Critically, *Montani* also involved an honest services conviction. *Id.* at 769. Without any analysis, the First and Third Circuits have acquiesced in treating illegal kickback schemes as commercial bribery when sentencing for mail fraud. *See United States v. Cohen*, 171 F.3d 796, 802-04 (3d Cir. 1999); *United*

States v. Josleyn, 99 F.3d 1182, 1198 (1st Cir. 1996), *cert. denied sub nom. Billmyer v. United States*, 519 U.S. 1116 (1997).

The Eleventh Circuit took its exceptional action on the basis of this summary: "In exchange for payment through an intermediary, [Petitioner deVegter] gave confidential documents to Poirier which improperly assisted Poirier's firm in the proposal process." *Poirier*, 321 F.3d at 1034. Thus, even the Eleventh Circuit's description of the facts confirms that the payment served as no more than the means to defraud Fulton County of its alleged property. *See Hauptman*, 111 F.3d at 50-51. The government failed to prove the only other substantive offense described in the indictment, deprivation of honest services. Under these circumstances, Application Note 14 to § 2F1.1 and *Braxton* mandate a sentence under the fraud guideline. For these reasons alone, the Eleventh Circuit's rejection of the fraud guideline warrants this Court's review. The extraordinary substitution of a different guideline when the indictment, verdict, and sentencing evidence fail to establish a different count of conviction contravene *Braxton*, the analysis of the other Circuits, and the plain language of the Sentencing Guidelines.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

DAVID G. RUSSELL
Counsel of Record
PARKER, HUDSON, RAINER
& DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Ave., N.E.
Atlanta, Georgia 30303
(404) 523-5300

BRUCE MALOY
MALOY & JENKINS
75 Fourteenth Street, NW
25th Floor
Atlanta, Georgia 30309

Attorneys for Petitioner
Michael deVegter

CRAIG A. GILLEN
GILLEN, PARKER & WITHERS LLC
One Securities Centre
Suite 1050
3490 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 842-9456

Attorneys for Petitioner
Richard Poirier, Jr.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 13, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15989

D.C. Docket No. 97-00508-CR-2-1-MHS

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

v.

RICHARD POIRIER, JR.,
MICHAEL DEVEGTER,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(February 13, 2003)

Before ANDERSON and CARNES, Circuit Judges, and POLLAK*, District Judge.

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

CARNES, Circuit Judge:

Defendants Michael deVegter and Richard Poirier, Jr. were convicted of wire fraud and conspiracy as a result of evidence that they participated in a scheme to defraud Fulton County, Georgia. In this appeal they challenge the sufficiency of the indictment, the sufficiency of the evidence against them, and the correctness of the jury instructions. Their arguments primarily center around their contention that Fulton County was not actually defrauded of "money and property," and for that reason their wire fraud convictions and the conspiracy convictions based upon the same prosecutorial theory cannot stand. DeVegter also challenges his sentence, arguing that the district court should not have applied the enhancement for abusing a position of trust. For reasons we will explain, we find no merit in the defendants' contentions.

The government, on the other hand, cross-appeals the sentences given both defendants on a variety of grounds, and its contentions do have merit.

I. BACKGROUND

Defendants deVegter and Poirier were indicted for their roles in corrupting the process by which Fulton County selected an underwriter for a bond refunding project. Fulton County hired deVegter to serve as its independent financial advisor as it solicited and evaluated proposals from competing underwriters. Poirier was a partner with Lazard Freres & Co. (the Lazard firm), which eventually was awarded the underwriting contract. In exchange for deVegter's covert assistance in ensuring that the Lazard firm's proposal was selected, Poirier through an

intermediary paid deVegter over $40,000.00. A grand jury subsequently indicted both deVegter and Poirier, charging them with three offenses: conspiracy to commit wire fraud in violation of 18 U.S.C. § 371; money-and-property wire fraud in violation of 18 U.S.C. § 1343; and honest-services wire fraud in violation of 18 U.S.C. § 1346.[1]

The jury returned a verdict finding both defendants guilty of conspiracy and of § 1343 wire fraud. It did not reach a verdict on the § 1346 honest services charge.

II. DISCUSSION

A. THE CONVICTIONS ISSUES

1. The Sufficiency of the Indictment

Defendants contend that the indictment was insufficient to support a conviction for *§ 1343* wire fraud, an issue we review *de novo*. *United States v. Pendergraft*, 297 F.3d 1198, 1204 (11th Cir. 2002). "Generally, an indictment is sufficient if it: 1) sets forth the elements of the offense in a manner which fairly informs the defendant of the charge against which he must defend and 2) enables him to enter a plea which will bar future prosecution for the same offense." *Belt v. United States*, 868 F.2d 1208, 1211 (11th Cir. 1989) (citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 2907 (1974)). "A grand jury indictment must set forth each essential element of an offense in

1. In a prior opinion in this case, we reversed the district court's dismissal of the § 1346 charge. *United States v. deVegter*, 198 F.3d 1324 (1999). That opinion details the allegations of the indictment more than we have here. *Id.* at 1326.

order for a resulting conviction to stand." *United States v. Italiano*, 837 F.2d 1480, 1482 (11th Cir. 1988) (quoting *United States v. Outler*, 659 F.2d 1306, 1310 (5th Cir. Unit B Oct. 1981) *overruled on other grounds by United States v. Steele*, 147 F.3d 1316, 1320 (11th Cir. 1998) (en banc)). The elements of a § 1343 wire fraud violation are: (1) intentional participation in a scheme to defraud; and (2) use of wire communications to further that scheme. *United States v. Brown*, 40 F.3d 1218, 1221 (11th Cir. 1994).

The defendants argue that the indictment was insufficient because it failed to specify the money or property Fulton County was deprived of. The indictment alleged that defendants "did knowingly and willfully devise and intend to devise a scheme and artifice to defraud Fulton County, Georgia, and its citizens of *money and property* and the good, faithful and honest services of defendant Michael deVegter." (emphasis added). In addition, the indictment specifically referred to §§ 1343 and 1346, the money and property and the honest services wire fraud provisions, respectively. Other parts of the indictment made it evident that the property involved was certain confidential information.

According to the indictment, deVegter "had a duty not to disclose confidential information received in his capacity as a financial advisor without Fulton County's permission." The indictment specified that while supposedly in the service of Fulton County, deVegter faxed a copy of Fulton County's early draft request for proposal to Poirier, and he later faxed a copy of its nearly-final draft request for proposal to a third party, who in turn faxed it to Poirier. In addition, the indictment alleged that deVegter obtained a copy of the proposal submitted by one

of the Lazard firm's competitors, which he faxed to Poirier. The point of the allegations was that deVegter was entrusted with Fulton County documents, which he improperly transferred to Poirier in return for money.

Although the indictment did not expressly allege that the documents deVegter obtained and transferred were confidential, "[w]hen analyzing challenges to the sufficiency of an indictment, courts give the indictment a common sense construction, and its validity is to be determined 'by practical, not technical, considerations.'" *United States v. Gold*, 743 F.2d 800, 812 (11th Cir. 1984) (quoting *United States v. Morano*, 697 F.2d 923, 927 (11th Cir. 1983)). Common sense tells us that the documents listed in the indictment constituted confidential information. Anyone with a modicum of understanding about bidding processes knows that those kind of documents are confidential. Moreover, the indictment's charge that the conduct violated § 1343 also indicates that they were.

Of course, the government could have avoided this issue altogether by simply saying in the indictment that the documents were confidential, but "the appropriate test . . . is not whether the indictment might have been drafted with more clarity, but whether it conforms to minimal constitutional standards." *United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. Unit A May 1981). "Minor deficiencies that do not prejudice the defendant will not prompt this Court to reverse a conviction." *United States v. Chilcote*, 724 F.2d 1498, 1505 (11th Cir. 1984). In other words, we do not punish a party for unnecessarily making us decide an issue by deciding that issue against the party.

Defendants also contend that even apart from the question of the adequacy of the allegations about confidentiality, the indictment was insufficient because the specified documents did not constitute property and therefore could not support a § 1343 wire fraud conviction. In *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875 (1987), the Supreme Court held that wire and mail fraud statutes protect only property rights, and that the words "to defraud," as used in the statutes, "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." *Id.* at 358, 107 S. Ct. at 2881 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S. Ct. 511, 512 (1924)) (internal quotation marks omitted).[2] With its *McNally* decision the Court overturned a line of cases that permitted wire fraud convictions based on deprivation of intangible rights like the right to honest services. *Id.* at 355-56, 107 S. Ct. at 2879.[3]

Shortly after *McNally*, the Supreme Court elaborated on the scope of § 1343 in *Carpenter v. United States*, 484 U.S.

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2. The convictions in *McNally* were based on § 1341 mail fraud, not § 1343 wire fraud. *McNally*, 483 U.S. at 352, 107 S. Ct. at 2877. The *McNally* decision is nonetheless instructive because "[t]he mail and wire fraud statutes share the same language in relevant part." *Carpenter v. United States*, 484 U.S. 19, 25 n.6, 108 S. Ct. 316, 320 n.6 (1987).

3. Congress responded to *McNally* by amending the mail fraud statute to include § 1346, which defines "the term 'scheme or artifice to defraud' [to] include[ ] a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346; *see also Belt*, 868 F.2d at 1212 n.4. Because the jury in this case was unable to reach a verdict on the § 1346 charge, this appeal involves only the § 1343 money or property fraud charge.

19, 108 S. Ct. 316 (1987). In that case the Court affirmed convictions stemming from the fraudulent misappropriation of pre-publication Wall Street Journal articles. *Id.* at 28, 108 S. Ct. at 321-22. In rejecting the contention that the defendants had not defrauded the Journal of money or property by disclosing and using the information in the stories before publication, the Court explained that "[t]he Journal, as [one of the defendant's] employer, was defrauded of much more than its contractual right to his honest and faithful service." *Id.* at 25, 108 S. Ct. at 320. Indeed, "the object of the scheme was to take the Journal's confidential business information . . . and its intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes. *McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.*, 108 S. Ct. at 320.

In this case Fulton County was involved in a competitive bidding process involving confidential information that, like the information in *Carpenter*, had commercial value. Fulton County had an interest in keeping its draft requests for proposals confidential until they were issued, and it had an interest in keeping submitted bids confidential until all of them had been received. Otherwise, the bidding process could become corrupted. As the Supreme Court noted, "[c]onfidential business information has long been recognized as property." *Carpenter*, 484 U.S. at 26, 108 S. Ct. at 320. The object of the scheme in this case, like the one in *Carpenter*, was to take the victim's confidential information by disclosing it early to those who could profit from that disclosure. And "its intangible nature does not make it any less 'property.'" *Id.* at 25, 108 S. Ct. at 320.

Appendix A

The *Carpenter* decision alone is enough to carry our conclusion, but there is further support for it in our case law. In *Belt*, we reinstated a conviction on facts that are similar. The defendant in that case pleaded guilty to § 1343 wire fraud prior to the Supreme Court's decision in *McNally*. *Belt*, 868 F.2d at 1210. The indictment alleged that by accepting bribes from companies bidding on subcontracts, Belt had defrauded his employer and deprived it of his honest services. *Id.* According to the indictment, Belt provided competing companies with secret bid information and other confidential documents. *Id.* After *McNally* was decided, the district court overturned Belt's conviction, concluding that the indictment was insufficient in view of *McNally*'s property deprivation requirement. *Id.* at 1210 n.2. We reversed the district court's decision for reasons that are equally applicable to this case:

> [T]he petitioner released confidential business information of his employer to third parties. In exchange for bribes, Belt released business information regarding the subcontractor bids submitted . . . which made the bids submitted higher than they normally would have been. We see little difference in the character of the confidential information involved in this case and that involved in *Carpenter*. In both cases, the confidentiality of the information was integral to the proper operation of the employer's business and to its reputation. Thus, although the scheme did not cause [Belt's employer] a direct monetary loss, like the information in *Carpenter*, the confidential information constituted an intangible property right protected under § 1343.

Id. at 1213.

For these reasons, the indictment in this case sufficiently alleged a deprivation of money and property under § 1343.[4]

2. The Correctness of the Jury Instructions

Defendants contend that even if the indictment were sufficient, the convictions should be overturned because the jury instructions were improper. According to defendants, the language in the instructions allowed the jury to return a guilty verdict upon finding nothing more than a financial gain to defendants. We review jury instructions only for an abuse of discretion. *Roberts & Schaefer Co. v. Hardaway Co.*, 152 F.3d 1283, 1295 (11th Cir. 1998).

The jury instructions explained that proof the defendants acted willfully and with the intent to defraud was essential to a guilty verdict. The instructions defined the necessary intent as follows: "To act with intent to defraud means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another *or* bringing about some financial gain to one's self." (emphasis added). Defendants contend that the "or" in that definition improperly allowed the jury to convict based only on a finding of financial gain to defendants. The language they focus on, though, defines intent. *Cf. United States v. De La Mata*, 266 F.3d 1275, 1299 n.30 (11th Cir. 2001) (affirming bank fraud conviction where identical words were used to define intent to defraud). It does

4. As alternative theories, the government contends that the bonds themselves were property and that the increased spread Fulton County paid on the bids was property. Because we find that the indictment sufficiently alleged a deprivation of property in the form of confidential information, we need not reach the government's alternative theories.

not define the offense itself. A complete reading of the instructions makes clear that a finding of financial gain alone is insufficient for a conviction. The jury instructions in this case adequately laid out the elements of money or property wire fraud:

> A defendant can be found guilty of [§ 1343 wire fraud] only if all of the following facts are proved beyond a reasonable doubt. First, that the defendant knowingly devised or participated in a scheme to defraud or for obtaining money or property by means of false pretenses, representations or promises. Second, that the defendant did so willfully and with an intent to defraud. Third, that the fraud related to a material matter. And, fourth, that the defendant [used wire communications].

After receiving that charge, the jury returned its verdict by checking "Guilty" under "Scheme to defraud Fulton County of money and property" on the special verdict form. "On appeal, we examine whether the jury instructions and verdict form, considered as a whole, were sufficient 'so that the jurors understood the issues and were not misled.'" *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1072 (11th Cir. 1996) (quoting *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1569 (11th Cir. 1991)). We do not focus on any single sentence in jury instructions because, "[i]f the instructions, taken together, properly express the law applicable to the case, no reversible error has occurred, even if an isolated clause may be inaccurate, ambiguous, incomplete, or otherwise subject to criticism." *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991). Having read the instructions as a whole and in conjunction with the verdict form, we are satisfied that the jury did not convict based solely upon a finding of financial gain for the defendants.

Appendix A

3. The Sufficiency of the Evidence

Defendants contend there was insufficient evidence to sustain their convictions for money and property wire fraud, which is an issue we decide *de novo*. *United States v. Suba*, 132 F.3d 662, 671 (11th Cir. 1998). We review the evidence to determine whether "a reasonable jury, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the government could find the defendant[s] guilty as charged beyond a reasonable doubt." *United States v. Navarro-Ordas*, 770 F.2d 959, 966 (11th Cir. 1985) (internal citations omitted).

The government presented evidence that deVegter had a duty to keep Fulton County's bidding documents confidential. The request for proposal to which deVegter responded in landing his position as financial advisor unequivocally stated that "[n]o reports, information, or data given to or prepared by the firm under the contract shall be made available to any individual or organization by the firm without the prior written approval of the County." There was evidence showing that deVegter accepted those terms, and therefore knew of his confidentiality obligation. The government also presented evidence that during the underwriter selection process, deVegter disclosed drafts of the request for proposal relating to that process to the Lazard firm. Defendants contend that the drafts were not confidential because they were comprised of public boilerplate provisions. The evidence, however, permitted the jury to find to the contrary. Fulton County's finance director testified that the request for proposal was "customized" for Fulton County and contained specific numerical assumptions unique to Fulton County's project. Besides, even if the drafts had contained only public provisions, the County's decision about which public provisions to include could itself constitute confidential information.

Appendix A

In addition to disclosing drafts of Fulton County's request for proposal before its release, there was evidence that deVegter forwarded Poirier a copy of a proposal submitted by Bear Stearns, a competitor of the Lazard firm. According to a government witness, Fulton County treated all proposals submitted, including the Bear Stearns proposal, as confidential until the selection was made public. The reasons the County wanted them kept confidential are obvious, and deVegter even admitted on cross examination that it would have been improper for him to disclose the Bear Stearns proposal to another competitor. He denied doing so, but there was plenty of evidence that he had faxed that proposal to the Lazard firm's office. Further, because the jury did not believe deVegter, his demeanor while testifying may be considered substantive evidence of his guilt. *See United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995).

Poirier's involvement in the scheme is also demonstrated by the evidence. The government presented testimony that Poirier was concerned that his firm was not in a good position to win the underwriting contract. His concern led him to authorize the payment to deVegter in exchange for deVegter's improper assistance. There was evidence that deVegter's improper and corrupt assistance aided Poirier in obtaining the contract for his firm.

In sum, the government presented evidence that deVegter had access to confidential documents, had a duty to protect them, and improperly disclosed them to Poirier and others. The evidence also demonstrated that Poirier authorized the illicit payment to deVegter in exchange for deVegter's assistance.

There was sufficient evidence for a jury to convict deVegter and Poirier.[5]

B. THE SENTENCE ISSUES

DeVegter contends that even if his conviction stands, his sentence should not because the district court erroneously applied the U.S.S.G. § 3B1.3 enhancement for abuse of a position of trust. His argument is based on the fact that he did not have the authority to make the final decision in Fulton County's awarding the underwriting business to the Lazard firm. That fact is not determinative. Fulton County hired deVegter to serve as a fair and unbiased financial advisor and put him in a position to do that. With that position came Fulton County's trust, and deVegter clearly abused it. The enhancement for abusing a position of trust was appropriate.

The government has cross-appealed contending that the district court: (1) applied the wrong guideline, and if not, that it incorrectly determined loss under U.S.S.G. § 2F1.1(b)(1), and should have imposed the § 2F1.1(b)(2) more than minimal planning enhancement; (2) should have imposed the obstruction of justice enhancement under § 3C1.1; and (3) should have imposed on Poirier an enhancement based on his leadership role under § 3B1.1.

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5. Defendants contend that their conspiracy convictions are based on their wire fraud convictions and should be reversed if those convictions are. Perhaps so, but we affirm the wire fraud convictions.

Appendix A

1. The Applicable Guideline

In sentencing the defendants the district court applied as the base offense guideline § 2F1.1, which covers offenses involving fraud or deceit. The government contends it should have applied § 2B4.1, which covers commercial bribery and kickbacks. We review *de novo* the district court's application of the law to the facts. *United States v. Geffrard*, 87 F.3d 448, 452 (11th Cir. 1996).

The offense conduct in this case is § 1343 wire fraud.[6] The Statutory Index lists two possible guidelines for that offense, §§ 2C1.7 & 2F1.1. U.S.S.G. appendix A. We agree with the parties that § 2C1.7 is inapplicable, which leaves § 2F1.1. The application of § 2F1.1 leads us to yet another guideline, because Application Note 14 to § 2F1.1 specifically allows for use of other guidelines in some circumstances. It says: "[i]n certain . . . cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses." U.S.S.G. § 2F1.1 n.14.[7] In those cases, a court should use another guideline if "the indictment or information setting forth the count of conviction . . . establishes

6. The defendants were also convicted of conspiracy to commit wire fraud. Under the sentencing guidelines, the two counts of conviction are grouped, and the more serious one is used for determining the offense conduct. *See* U.S.S.G. §§ 3D1.2(b) & n.4, 3(a). Here, that is the wire fraud count.

7. We follow the Application Note because commentary to the guideline is authoritative and binding unless it is inconsistent with the Constitution, a federal statute, or the guidelines themselves. *Stinson v. United States*, 508 U.S. 36, 37, 113 S. Ct. 1913, 1915 (1993).

an offense more aptly covered by another guideline." *Id.*; *see also United States v. Kurtz*, 237 F.3d 154, 156 (2d Cir. 2001) ("[W]hen sentencing a defendant . . . under the 2000 version of the Guidelines, the district court is to look to § 2F1.1; and that section, as explicated in Application Note 14, gives the court express authority to apply a different guideline that is 'more apt[ ].'").[8] Thus, the question is whether defendants' conduct is

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8. Until November 2000, the Statutory Index included the following language: "If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted." U.S.S.G. Appendix A (1999). Dropping that language was part of an effort "intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction unless the case falls within the limited 'stipulation' exception set forth in § 1B1.2(a)." U.S.S.G. Amendment 591 (explanation). The amendment left in place Application Note 14 to § 2F1.1 allowing courts to apply a different guideline if the indictment or information setting forth the count of conviction established an offense "more aptly covered by another guideline." U.S.S.G. § 2F1.1 n.14.

The current guidelines merge § 2F1.1 with § 2B1.1 and abandon Application Note 14, but new § 2B1.1(c)(3) stands in its place and specifies that: "If [certain conditions are not applicable and] the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (offense Conduct), [courts should] apply that other guideline." U.S.S.G. § 2B1.1(c)(3) (2002). The amendment to include § 2B1.1(c)(3):

> is more generally applicable and intended to apply whenever a broadly applicable fraud statute is used to

(Cont'd)

"more aptly" covered by a guideline other than § 2F1.1, the one for fraud or deceit.

As we have already explained, Fulton County hired deVegter to provide fair and disinterested assistance in selecting an underwriter, and deVegter betrayed Fulton County. In exchange for payment through an intermediary, he gave confidential documents to Poirier which improperly assisted Poirier's firm in the proposal process. We conclude that the defendants' "conduct more closely resembled a fraud achieved through bribery than a straight fraud," *United States v. Montani*, 204 F.3d 761, 769 (7th Cir. 2000), and for that reason the § 2B4.1 guideline applies. Our conclusion is supported by other decisions in which courts have applied the commercial bribery guideline to fraud convictions. *See, e.g., id.* (§§ 1341 and 1346 mail fraud convictions sentenced under § 2B4.1); *United States v. Cohen*, 171 F.3d 796 (3d Cir. 1999) (§ 1341 mail fraud conviction sentenced under § 2B4.1); *United States v. Josleyn*, 99 F.3d 1182 (1st Cir. 1996) (conspiracy and § 1341 convictions sentenced under § 2B4.1).

(Cont'd)

> reach conduct that is addressed more specifically in another Chapter Two guideline. Prior to this amendment, the fraud guideline contained an application note [14] that instructed the user to move to another, more appropriate Chapter Two guideline, under specified circumstances.

U.S.S.G. Amendment 617. For purposes of this appeal, we will apply the 2000 version of the guidelines because it was in effect at the time of sentencing and the version in effect at the time of the offense conduct is not more favorable to the defendants. U.S.S.G. § 1B1.11.

The defendants attempt to distinguish *Montani* on the basis that they, unlike the defendant in that case, were not convicted of § 1346 honest services fraud. According to deVegter, "the hallmark of commercial bribery is the deprivation of honest services." It is certainly true that accepting or providing bribes is inconsistent with the delivery of honest services, but that is not to say that the commercial bribery guideline cannot also be applied to a § 1343 money and property wire fraud case. The defendants' conduct in giving and receiving money in exchange for the misappropriation of documents is "more aptly" covered by the commercial bribery guideline than by the fraud guideline.

Our decision in *United States v. Saavedra*, 148 F.3d 1311 (11th Cir. 1998), is not to the contrary. In that case the Statutory Index to the sentencing guidelines listed only one guideline for the offense conduct. *Id.* at 1315. That guideline contained no applicable cross-references to other guidelines, but the sentencing court nevertheless applied a different guideline. *Id.* at 1313. We vacated the sentence because "[t]here is no provision in the guidelines for borrowing base offense levels from other offense guidelines." *Saavedra*, 148 F.3d at 1316.

In contrast to *Saavedra*, applying § 2B4.1 in this case does not constitute unauthorized "borrowing . . . from other offense guidelines," because "[o]nce the proper guideline section has been selected, relevant conduct is considered in determining various sentencing considerations *within that guideline, including* the base offense level, specific offense characteristics, and *any cross-references*." *Id.* at 1317 (citing U.S.S.G. § 1B1.3(a)) (emphasis added). We get to § 2B4.1 by applying § 2F1.1, which is the guideline specifically associated with the

offense conduct. Application Note 14 of § 2F1.1 is essentially a cross reference that sends us to § 2B4.1. We are not improperly "borrowing . . . from other offense guidelines," but instead are applying the offense guideline and its Application Note.

For these reasons, the sentencing court should have reached and applied § 2B4.1 to determine the defendants' base offense level. We will remand for correction of that error.

Because we conclude that § 2F1.1 was not the correct guideline, we need not consider the government's contentions that the sentencing court incorrectly determined loss under § 2F1.1, and that it should have imposed that guideline's more than minimal planning enhancement.

2. The Obstruction of Justice Enhancement

The sentencing guidelines provide for an increased sentence if a defendant "willfully obstructed or impeded . . . the administration of justice during the course of the investigation, prosecution, or sentencing." U.S.S.G. § 3C1.1. The government contends that the district court erred in not enhancing defendants' sentences under this provision.

We review a district court's determination about whether a defendant obstructed justice only for clear error, *United States v. Cain*, 881 F.2d 980, 982 (11th Cir. 1989), and "[w]e will not find clear error unless our review of the record leaves us 'with the definite and firm conviction that a mistake has been committed,'" *Coggin v. Commissioner*, 71 F.3d 855, 860 (11th Cir. 1996) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948)). That high standard is met in this case.

The record clearly establishes that both defendants obstructed justice. They each provided false testimony to the Securities and Exchange Commission in an effort to conceal their conduct. In addition, each of them encouraged another person to provide false testimony. DeVegter tried to convince Nat Cole, a middleman in the scheme, to sign a false affidavit, and Poirier persuaded a colleague of his at the Lazard firm, Jim Eaton, to lie to the SEC. Finally, deVegter provided false testimony at trial and stubbornly maintained his incredible testimony that the money he received was for legitimate, unrelated consulting engagements. In the face of all this evidence of obstruction, the sentencing court, without further explanation, simply said: "I find there is no willful attempt by either defendant to obstruct the investigation, nothing in the defendants' conduct that would warrant an obstruction adjustment, so there will be no enhancement." We are left with the definite and firm conviction that the sentencing court should have applied the enhancement for obstruction of justice to both defendants. Its inexplicable finding that the defendants did not obstruct justice is clearly erroneous, and must be corrected on remand.

3. The Aggravating Role Enhancement for Poirier

The guidelines provide for an enhancement where a defendant was an organizer, leader, manager, or supervisor in the criminal activity. U.S.S.G. § 3B1.1. A two-level increase in the offense level is required "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity" and the offense did not "involve[ ] five or more participants or was otherwise extensive" (in which case a three- or four-level increase would be required). U.S.S.G. § 3B1.1(c), (b). In this case the sentencing court declined to enhance either defendant's sentence

for an aggravating role. The government accepts that decision as it involves deVegter, but contends that the enhancement should have been applied in Poirier's case.

We review only for clear error a sentencing court's decision about whether to impose an aggravating role enhancement. *United States v. Phillips*, 287 F.3d 1053, 1055 (11th Cir. 2002). The evidence at trial established that Poirier supervised Jim Eaton at the Lazard firm, and that he authorized Eaton to make the corrupt payoff to a person who passed half the money on to deVegter. To qualify for an increase under § 3B1.1, "the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." U.S.S.G. § 3B1.1 n.2. The evidence at trial read in light of the guilty verdict establishes that Eaton was a participant in the criminal activity as defined by the guidelines, *id.* n.1, and Poirier was his superior, his supervisor, and his manager. The district court did not find to the contrary, but instead simply and inexplicably failed to apply the enhancement. That was clear error. On remand the § 3B1.1(c) enhancement must be applied to Poirier.

III. CONCLUSION

The convictions of deVegter and Poirier are AFFIRMED. The sentencing decisions of the district court are AFFIRMED IN PART and REVERSED IN PART, and the case is REMANDED to the district court for resentencing. At resentencing, the court must apply in both cases the § 2B4.1 offense guideline and the obstruction of justice enhancement, and in Poirier's case it must apply the § 3B1.1(c) aggravating role enhancement.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND FILED MARCH 24, 2003

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRIMINAL ACTION

1:97-CR-508-MHS

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL S. DEVEGTER and RICHARD POIRIER, JR.,

Defendants.

ORDER

This matter is before the Court on the government's request that the undersigned (the sentencing judge) be replaced. The appellate court (the panel) treated this request as a motion, pointing out that no decision on the motion is necessary at this time as the trial judge, Willis B. Hunt Jr., would normally preside over the resentencing of the defendants on remand, suggesting that if that expectation were wrong, the panel would then rule on the motion.

Appendix B

There is no need for the panel to address the motion as this Court advised Judge Hunt that this Court cannot in good conscience impose the harsher sentence required by the panel's decision. As a senior judge, this Court can recuse without an explanation however, given the panel's factual findings and obvious disagreement with this Court on the role of the sentencing court and that of an appellate panel, a review of this case is useful for future guidance.

The indictment in this case charged defendants with money-and-property wire fraud (18 U.S.C. § 1343), honest services wire fraud (18 U.S.C. § 1346), and the related conspiracy (18 U.S.C. § 371). The jury found defendants guilty of money-and-property wire fraud and the related conspiracy, but was unable to reach a verdict on the honest services charge. That charge was abandoned by the government.

At the sentencing hearing, counsel was offered an opportunity to make a brief argument and present evidence on each objection to the presentence report. The government made an impressive argument but offered no witnesses or evidence,[1] nor was the Court directed to any specific testimony in the trial transcript in support of its position.

The defendants tendered one witness, Peter Cunningham, the Fulton County Finance Director at the time of the transaction,

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1. The government did offer the statement Patrick O'Connor, the current Fulton County Finance Director, as the victim representative of Fulton County. Mr. O'Connor made "a few brief, generic comments" on the role of a financial advisor and their impact on Fulton County. (T-136-38.)

whose testimony is critical to the issue here.[2] Mr. Cunningham testified that the county received the honest opinion of defendant deVegter (T-59-60), and that if Lazard Freres paid deVegter any fee it was for nothing (T-60), since the county was "only interested in the [underwriting] spread" (T-57), which would not be affected by a finder's fee (T-56); and, further, that the county suffered no economic or financial loss as a result of any such payment (T-57), but that this was a "fair deal" for the county (T-79-80), which saved the county some 8.6 million dollars. (T-56-57.) Mr. Cunningham further testified that "I don't see where Fulton County lost anything if the companies are paying finder's fees, which is standard." (T-57.)

This Court then questioned the witness:

> THE COURT: Let me ask you this, sir: Do you feel in your dealings with Mr. Devegter in connection with this transaction that Fulton County received the pure, unadulterated, honest opinion of Mr. Devegter in connection with this deal?
>
> THE WITNESS: Yes, I do. And, in fact, in discussions I had with, I think it was, the prosecutors, they asked me about this payment and I said, well, if Lazard paid him that money, then they paid it for

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2. Defendant deVegter also offered two character witnesses: Hamilton Jordan, who described Mr. deVegter's long and valuable involvement in community service work on behalf of Camp Sunshine since its inception in the early 1980s (T-5-9), and Bill Bolling, who testified as to Mr. deVegter's valuable involvement on behalf of the Atlanta Community Food Bank for over 20 years. (T-9-14.)

nothing, because he did nothing to influence that decision. (T-59-60.)

The government cross-examined Mr. Cunningham but offered no rebuttal witnesses or evidence.

This Court, with 55 years of trial experience, found Mr. Cunningham to be a credible witness and questioned whether the defendants were guilty of any crime, querying the government as to why Lazard's involvement was handled administratively with a fine and the defendants were indicted.

The role of a sentencing court is well defined in this circuit. On sentencing, the burden is on the government to establish by a preponderance of the evidence disputed facts that would affect a defendant's sentence. "[T]he preponderance standard is not toothless. It is the district court's *duty* to insure that the Government carries this burden by presenting reliable and *specific* evidence." *U.S. v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995) (emphasis supplied). That the government failed to do.

Further, the evidence presented at trial does not control for sentencing purposes. This Court is required "independently to consider proffered information that is relevant to matters of consequence in the sentencing determination." *U.S. v. Tavano*, 12 F.3d 301, 307 (1st Cir. 1993).

This Court imposed a sentence based on the count of conviction, applying the § 2F1.1 sentencing guideline for wire fraud. The panel, ignoring both that the "honest services" charge was abandoned by the government and the testimony of Mr. Cunningham at the sentencing hearing, found that defendant

deVegter "betrayed" Fulton County by not providing "fair and disinterested" services, and "that the defendants' 'conduct more closely resembled a fraud achieved through bribery than a straight fraud.'" Slip op. at 1384 (quoting *United States v. Alontani*, 204 F.3d 761, 769 (7th Cir. 2000)). The panel concluded that defendants should be punished applying sentencing guideline § 2B4.1 for commercial bribery. *Id.* at 1385.

The Court assumes for purposes of this order that the panel's scholarly opinion is correct that, while the Statutory Index provides for the application of § 2F1.1 in this case, Application Note 14 to § 2F1.1 "gives the court the express authority to apply a different guideline that is 'more apt[].'" Slip op. at 1384 (quoting *United States v. Kurtz*, 237 F.3d 154, 156 (2d Cir. 2001)). The crucial question here is who makes the decision as to whether a different guideline is "more apt" - the panel, relying on the trial transcript, or the sentencing judge, based on all the relevant evidence, including testimony at sentencing?

The First Circuit and arguably the Eleventh Circuit seem to say it's the sentencing court's call. Otherwise, what would be the point of the sentencing court's addressing the defendants' objection to the probation officer's finding that a guideline other than that called for in the Statutory Index be employed?

Considering this Court's questioning whether there is any crime at all here, the Court's findings on the remaining objections to the presentence report should be fairly obvious, though not sufficiently specific.

Appendix B

The undersigned hereby RECUSES himself from this case and DIRECTS the Clerk to reassign the case to Judge Willis B. Hunt Jr. If the convictions are affirmed, this Court suggests that the order of remand furnish the trial judge an opportunity to impose a fair and proportionate sentence by considering the trial evidence and that offered at sentencing in determining whether guideline § 2F1.1 provided for by the Statutory Index or guideline § 2B4.1 should apply and to rule on the other objections to the presentence report.

IT IS SO ORDERED, this 24th day of March, 2003.

s/ Marvin H. Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED APRIL 15, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-15989-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

RICHARD POIRIER, JR., MICHAEL DEVEGTER,

Defendants-Appellants
Cross-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19 __, __ F.2d __).

Before: ANDERSON and CARNES, Circuit Judges, and POLLAK*, District Judge.

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ E. Carnes
UNITED STATES CIRCUIT JUDGE